Office-Supreme Court, U.S.
FILED
APR 22 1981
ALEXANDER L. STEVAS,
CLERK

80-1764

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

QUESTION PRESENTED

IS A BACKYARD, *IPSO FACTO*, AN AREA INEVITABLY ASSOCIATED WITH A REASONABLE EXPECTATION OF PRIVACY?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1-2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-5
REASONS FOR GRANTING THE WRIT	5-11
I. THE DECISION OF THE FLORIDA SUPREME COURT RAISES IMPORTANT FEDERAL QUESTIONS INVOLVING PRIVACY EXPECTATIONS	5-7
II. THE DECISION OF THE SUPREME COURT OF FLORIDA CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND FEDERAL COURTS OF APPEAL ON WHETHER OPEN FIELDS ARE INEVITABLY ASSOCIATED WITH PRIVACY EXPECTATIONS.	7-11
CONCLUSION	12
CERTIFICATE OF SERVICE	13
APPENDIX	A1-A27
OPINION OF FLORIDA SUPREME COURT	A1-A14

OPINION OF DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA — A15-A26

ORDER OF FLORIDA SUPREME COURT DENYING REHEARING — A27

TABLE OF CITATIONS

CASES:	Page
Arkansas v. Sanders, 422 U.S. 753 (1979) *n.1, n.4*	5,6
Hester v. United States, 265 U.S. 57 (1924)	8
Katz v. United States, 389 U.S. 347 (1967) *n.6*	9
Lewis v. United States, 385 U.S. 206 (1966) *n.5*	6
Mancusi v. DeForte, 392 U.S. 364 (1968) *n.3*	6
Morsman v. State, 360 So.2d 137 (Fla. 2d DCA 1978)	1,4
Payton v. New York, 63 L.Ed.2d 639 (1980) *n.2*	5
United States v. Basile, 569 F.2d 1053 (9th Cir. 1978)	8,9-10
United States v. Chadwick, 433 U.S. 1 (1977) *n.4*	6
United States v. Johnson, 561 F.2d 832 (D.C. Cir. 1977)	8,11
United States v. Sorce, 325 F.2d 84 (7th Cir. 1963)	8
United States v. Williams, 581 F.2d 451 (5th Cir. 1978)	8,10, 11

Weeks v. United States, 232 U.S. 383 (1914) *n.2* 5

UNITED STATES CONSTITUTION:

Amendment IV 2

OTHER TEXTS AND AUTHORITIES:

28 U.S.C. § 1257(3) 1

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of Florida is as of this date unreported, but appears in the appendix hereto as A.-1 - A.14. The opinion of the District Court of Appeal, Second District, State of Florida is reported in 360 So.2d 137 and appears in the appendix hereto as A.15 - A.26.

JURISDICTIONAL STATEMENT

The Florida Supreme Court entered its judgment on January 8, 1981 (A.1 - A.14). On March 19, 1981, it denied a timely filed petition for rehearing (A.27). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) in that the Supreme Court of Florida is the highest court in the State of Florida in which

a decision could be had. This petition for writ of certiorari was filed within sixty (60) days of the day, March 19, 1981, that the Supreme Court of Florida denied the petition for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> AMENDMENT IV.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent was charged by the State of Florida with felonious possession of marijuana. He filed a pre-trial motion to suppress. A hearing was held where at that hearing the facts were stipulated to between counsel; viz:

One of respondent's neighbors had told a second neighbor that there were marijuana ". . . plants being grown in [respondent's] backyard . . ." (A.2). Deputy Sheriff Skeen went to respondent's residence to investigate the complaint. When no one answered his knock on respondent's front door, Deputy Skeen ". . . walked around the house and saw the marijuana plants growing in the backyard. . ." (A.2). The deputy then seized the plants and subsequently arrested respondent.

The motion to suppress was denied and respondent pled *nolo contendere*, reserving his right to appeal the denial of the motion. The Florida District Court of Appeal, Second District, reversed, holding that the search and seizure were illegal, *Morsman v. State*, 360 So.2d 137 (Fla. 2d DCA 1978)(A.15 - A.26). The Florida Supreme Court granted discretionary review and affirmed, holding that respondent had a reasonable expectation of privacy in the marijuana plants growing in his backyard. The Florida Supreme Court reasoned that while one does not harbor an expectation of privacy on his front porch he does so with respect to his backyard ". . . because passersby cannot generally view this area. . . ." (A.4 - A.5).

The Florida Supreme Court held this expectation to be reasonable even though

". . . these marijuana plants [were] growing in his unfenced backyard to the plain view of his nieghbors. . ." (A.13; Alderman, J., dissenting), and that the ". . .defendant's *Fourth* Amendment right to be free from an unreasonable search and seizure." (A.9 - A.10) (emphasis supplied), was violated.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FLORIDA SUPREME COURT RAISES IMPORTANT FEDERAL QUESTION INVOLVING PRIVACY EXPECTATIONS.

The Court has held that there are certain areas ". . . *inevitably* associated with expectations of privacy. . ." (emphasis supplied).[1/] A man's home[2/] is,

---

1. *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979).

2. *Payton v. New York*, 63 L.Ed.2d 639 (1980), *Weeks v. United States*, 232 U.S. 383 (1914).

of course, one; his office[3] another and his suitcase,[4] still yet, another. Other areas are not so *inevitably* associated and require that there be at least a demonstrable expectation.[5] The Florida Supreme Court includes the backyard as one of those areas *inevitably* associated with privacy expectations.

The Florida Supreme Court's decision raises important federal questions. In most instances backyards abut the backyards of other property owners and things or matters contained therein are easily visible by neighbors. To hold that a backyard, *ipso facto*, is an area *inevitably* associated with privacy expectations is

---

3. *Mancusi v. DeForte*, 392 U.S. 364 (1968).

4. *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

5. Such as a business area, *Lewis v. United States*, 386 U.S. 939 (1966).

is to prostitute the concept that privacy expectations must be objectively reasonable. The decision broadens, immeasurably, those areas wherein subjective expectations of privacy may be considered objectively reasonable.

II. THE DECISION OF THE SUPREME COURT OF FLORIDA CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND FEDERAL COURTS OF APPEAL ON WHETHER OPEN FIELDS ARE INEVITABLY ASSOCIATED WITH PRIVACY EXPECTATIONS.

In holding that a backyard, *ipso facto*, is inevitably associated with privacy expectations, the decision of the Florida Supreme Court conflicts with decisions of the Court and federal circuit courts of appeal on whether "open fields" are inevitably associated with privacy expectations.

In *Hester v. United States*, 265 U.S. 57 (1924), the Court said that ". . . the special protection accorded by the 4th Amendment . . . is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

Various circuits relying on *Hester* have held that even if a police officer commits a civil or technical trespass, if that trespass is on an "open field" whatever he sees in plain view is not protected by the Fourth Amendment, *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978); *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1963); *United States v. Basile*, 569 F.2d 1053 (9th Cir. 1978); *United States v. Johnson*, 561 F.2d 832 (D.C. Cir. 1977).

These circuits have not been unmindful of the fact that since

Katz[6] the proper focus in determining Fourth Amendment violations has been on privacy expectations rather than on property concepts. Nevertheless, they recognize that the "open field" doctrine continues to be viable as an indication of areas where one's privacy expectations might not be objectively reasonable. Recognizing that "open field" areas surrounding a house, without more, are not inevitably associated with privacy expectations, they hold that a technical or civil trespass on an "open field" by an officer does not violate the Fourth Amendment. In *Basile* the Ninth Circuit elaborated:

> "The Fourth Amendment's protections do not extend to the 'open field' area surrounding a dwelling and the immediately adjacent curtilage,

---

6. *Katz v. United States*, 389 U.S. 347 (1967).

> and therefore, information gained as a result of a civil trespass on an 'open field' area is not constitutionally tainted, nor is the search and seizure which ultimately results from acquiring that information.". . .
>
> (Text at 1056)

Since the marijuana plants in the instant case were located in the backyard, an area not enclosed and visible to the neighbors, thus an "open field," the Florida Supreme Court's decision cannot be reconciled with *Basile*.

In *United States v. Williams*, *supra*, the officers had to trespass by crossing over a fence before they could detect an odor of moonshine liquor eminating from a shed on the property. The Fifth Circuit held there was no expectation of privacy in the "open field" area surrounding the shed and that the fence did not make it so because it was neither

a privacy nor an exclusionary one, but one simply to enclose animals. Since a backyard, without more, is an open field area the *Williams* decision cannot be reconciled with the instant case.

The District of Columbia Circuit also refuses to recognize any privacy expectations with respect to the "open field" area surrounding a home. In *United States v. Johnson, supra,* an officer acting on a tip committed a technical trespass by stepping two or three feet on to the property in order to look into a lighted window where he observed contraband. The court held that since the officer's technical trespass was on the open field area surrounding the house the trespass did not constitute a Fourth Amendment violation.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of Florida.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the _____ day of April, 1981, I served three copies of the Petition for Writ of Certiorari on David A. Davis, Esquire, Assistant Public Defender, Hall of Justice Annex, 495 North Carpenter Street, Bartow, Florida 33830, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

APPENDIX

SUPREME COURT OF FLORIDA

No. 54,632

STATE OF FLORIDA, Petitioner,

v.

JOHN HENRY MORSMAN, Respondent.

[January 8, 1981]

ADKINS, J.

Defendant was charged with felonious possession of marijuana. After his motion to suppress evidence was denied, he pled nolo contendere, reserving his right to appeal denial of the motion. The court of appeal reversed, holding that the search and seizure were illegal. Morsman v. State, 360 So.2d 137 (Fla. 2d DCA 1978). This cause is here on grounds that the lower court decision allegedly conflicts with decisions of this Court and the

Florida Fourth District Court of Appeal. Art. V, § 3(b)(3), Fla. Const. We affirm.

One of the defendant's neighbors told a second neighbor that there were marijuana plants growing in defendant's backyard, and the second neighbor called the sheriff's department. Deputy Sheriff Skeen investigated the neighborhood complaint. When no one answered Deputy Skeen's knock on defendant's front door, he walked around the house and saw the marijuana plants growing in the backyard just as the neighbors had reported. The officer then seized the plants. It appears from the record that the plants could not be seen from the street or the front yard, although the yard was not fenced in.

The state's argument is that an officer may seize contraband which is in plain view without obtaining a warrant.

However, this doctrine applies only when the officer has a legal right to be at his viewpoint. The officer had no right to be in the respondent's backyard, so he could not legally seize the marijuana plants.

Furthermore, the information providing the basis for the police investigation of defendant's house and yard was received from a neighbor who had heard it from another neighbor. Dependability of such second-hand hearsay is dubious. When hearsay makes up the basis of a complaint, the warrant clause requires that the evidence be presented to a detached magistrate to decide if the hearsay information gives probable cause to conduct a search. If it does, the magistrate may then issue a search warrant. House v. State, 323 So.2d 659 (Fla. 1st DCA 1975). Under this procedure, a person is protected from an unreasonable search

in violation of his Fourth Amendment rights. It is impossible to tell from the record before us whether the information conveyed to the police by the second neighbor was in any way worthy of belief at the time it was conveyed. It is exactly this type of situation which mandates the protection of the Fourth Amendment.

When the officer went to respondent's front door to investigate the neighborhood complaint, he was not infringing upon respondent's privacy. Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at any time. State v. Detlefson, 335 So.2d 371 (Fla. 1st DCA 1976); State v. Belcher, 317 So.2d 842 (Fla. 2d DCA 1975). However, the backyard of a residence is more private because passersby

cannot generally view this area. In Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974), this concept was extended to the backyard of a four-unit apartment building. Although not as exclusive as the backyard of a private residence, the backyard was not a common passageway normally used by tenants or businessmen who might approach the tenants. Accord, Olivera v. State, 315 So.2d 487, 490 (Fla. 2d DCA 1975).

In Huffer v. State, 344 So.2d 1332 (Fla. 2d DCA 1977), a backyard hothouse was searched for contraband. The Court held that the search was an illegal privacy invasion because, among other things, the hothouse was located behind the residence and was not plainly visible to the public.

The officers in State v. Ashby, 245 So.2d 225 (Fla. 1971) (cited by the

state), entered a yard without a warrant and seized items legally. However, they first observed the stolen car and trailer from the street. While officers were legally on the property to seize the items as evidence of a felony, they found a stolen boat and motor which they lawfully confiscated. The defendant had been arrested prior to any seizure. In the present case, respondent had not been arrested, and no circumstance allowed the officer to do more than knock at respondent's front door. The officer's venture into the private backyard was an illegal attempt to verify neighborhood rumors. There is no conflict.

Our recent opinion in Norman v. State, 379 So.2d 643 (Fla. 1980), addresses privacy expectations in areas of property. Property rights should be considered in determining whether an

individual's expectations of privacy are reasonable. One who controls property, whether owner or tenant, will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude. Respondent's privacy expectation in the backyard was valid where objects placed there were not visible from outside.

This case can be distinguished from Lightfoot v. State, 356 So.2d 331 (Fla. 4th DCA 1978) (cited by the state), by the different points from which officers viewed marijuana growing. In Lightfoot, the policeman first saw the marijuana from a neighbor's yard. The view was unobstructed, evidencing no expectation of privacy from that point. Observation in the current case was from within defendant's backyard. Since there is no information in the record that the plants

were visible from outside the yard, there was a strong expectation of privacy indicated, and the search and seizure were improper. When there is no legal right to observe an article of contraband, it is illegal to seize the article. Katz v. United States, 389 U.S. 347 (1967).

The district court commented that the officer's view of the plants only gave probable cause to get a search warrant. However, we feel that the holding in Purcell v. State, 325 So.2d 83 (Fla. 1st DCA 1976) precludes that possibility. The Purcell court correctly held that a preceding illegal search cannot furnish probable cause to support a subsequent search warrant. As noted above, it is possible that the neighbor's report may have provided probable cause, but this cannot be ascertained from the record.

The defendant showed that the plants were located and seized without a warrant, at which point the burden shifted to the state to justify the search and seizure. Raffield v. State, 351 So.2d 945 (Fla. 1977); reversed on other grounds, 362 So.2d 138 (Fla. 1st DCA 1978). The plants were not open to view. There were no exigent circumstances to allow the officer to enter defendant's backyard and seize the marijuana plants to prevent destruction or removal of evidence. The policeman had time to talk to the neighbor who had actually observed the marijuana to get facts to give probable cause to search. Then he could have tried to obtain a search warrant. The shortcut taken by skipping the application for a warrant was unjustified and violated defendant's Fourth Amendment right to be free from an unreasonable

search and seizure.

The cases cited as being in conflict with the decision of the district court of appeal are distinguishable. The writ of certiorari is, therefore, discharged.

SUNDBERG, C.J., BOYD and ENGLAND, JJ., concur
ALDERMAN, J., dissents with an opinion with which OVERTON, J., concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ALDERMAN, J., dissenting.

I disagree with the majority's conclusion that the officer had no right to be in Morsman's backyard where he made the plain view sighting of the marijuana plants growing in Morsman's backyard. The seizure of this property in plain view involved no invasion of Morsman's privacy and is presumptively reasonable. See Payton v. New York, 48 U.S.L.W. 4375

(April 15, 1980). As conceded by the majority, the officer had the legal right to go to Morsman's front door and to inquire about the neighborhood complaint. When no one answered the front door, he walked around to the back of the house to see if anyone was there. It was at this time that he observed the marijuana plants.

I believe that an officer who, as in the present case, goes to a residence in response to a neighborhood complaint, knocks on the front door and gets no respoinse may legally walk around to the back of the house, which in this case was not fenced, to see if anyone was there or to knock on the back door. The officer is not trespassing when he walks around to the backyard for these purposes, just as he was not trespassing when he went to the front door. He did not go to the

back of the house to look for or to seize the marijuana plants. He merely saw them in plain view while he was legally in Morsman's yard.

In a decision rendered subsequent to the present decision, the Second District expressed qualms about its decision now before us for review and said: "[W]e have serious reservations about the proposition that a person has an expectation of privacy in contraband in plain view in a backyard protected only by a chain link fence." Rickard v. State, 361 So.2d 822, 823 (Fla. 2d DCA 1978).

To claim violation of his fourth amendment right to be free from an unreasonable search and seizure, it was incumbent upon Morsman to establish that he had a reasonable expectation of privacy. United States v. Salvucci, 48 U.S.L.W. 4859 (June 25, 1980); Rakas v. Illinois,

439 U.S. 128 (1978). The exposure of these marijuana plants growing in his unfenced backyard to the plain view of his neighbors evidenced that Morsman did not have any reasonable expectation of privacy regarding these plants. He has failed to establish any intention to keep these plants to himself. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). See Lightfoot v. State, 356 So.2d 331 (Fla. 4th DCA 1978), wherein the District Court of Appeal, Fourth District, concluded that a person who keeps marijuana plants in open view in his backyard in plain view of a neighbor has no reasonable expectation of privacy in these plants.

OVERTON, J., concurs

Certiorari to the District Court of Appeal,

Second District - No. 76-1543

Jim Smith, Attorney General, Tallahassee, Florida, and Charles Corces, Jr., Assistant Attorney General, Tampa, Florida,

for Petitioner

Jack O. Johnson, Public Defender, and James R. Wulchak and P. Douglas Brinkmeyer, Assistant Public Defenders, Bartow, Florida,

for Respondent

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING PETITION AND,
IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JANUARY TERM, A. D. 1978

JOHN HENRY MORSMAN,
Appellant,
v. CASE NO. 76-1543
STATE OF FLORIDA,
Appellee.

Opinion filed June 28, 1978.

Appeal from the Circuit
Court for Sarasota County;
Stephen L. Dakan, Judge.

Jack O. Johnson, Public
Defender, Lawrence D. Shearer,
Douglas Brinkmeyer, and
Carole Grayson, Assistant
Public Defenders, Bartow,
for Appellant.

Robert L. Shevin, Attorney
General, Tallahassee, and

Charles Corces, Jr.,
Assistant Attorney General,
Tampa, for Appellee.

BOARDMAN, Chief Judge.

Appellant/defendant John Henry Morsman was charged with felonious possession of marijuana. He pled nolo contendere, reserving his right to appeal the denial of his motion to suppress the marijuana plants which were the basis of the charge. The trial court withheld adjudication and placed appellant on one year probation, and fined him $200.

The facts developed at the hearing on the motion to suppress and not disputed by either appellant or the state demonstrate that the contraband at issue was seized from the backyard of appellant's residence by a sheriff's officer without a warrant. Officer Skeens had gone to the residence to investigate a report

originating from a statement made by one of appellant's neighbors to a second neighbor that there were marijuana plants growing in appellant's back yard. Skeens had become aware of the matter after the second neighbor lodged a complaint with another deputy at the sheriff's department. When no one answered Skeen's knock at appellant's front door he walked around to the back of the dwelling and saw plants which he recognized as marijuana.[1/] He proceeded further around the residence and observed additional marijuana plants. Skeens then seized the contraband. Although the record does not clearly reflect where the plants were

---

1. The assistant state attorney stated at the hearing that Skeens went to the back of the house to see if anyone was there but he did not state that the officer was acting on or had any indication that there were persons in the residence or on the premises.

located or at what point in the officer's circuit of the dwelling he initially observed them, it does appear that they could not be seen from appellant's front yard or from the street. It also appears from the record that the yard was not enclosed. There is no evidence in the record which explains how the first neighbor became aware of the plants, for example, whether he could easily and clearly see them from his property and identify the plants as marijuana from that distance, whether he had to employ extraordinary measures to see and identify the plants only from a point on appellant's property.

The threshold question presented in this case is whether the fourth amendment proscription against an unreasonable search and seizure is applicable to evidence located in the yard surrounding a residential dwelling. Subsequent to Katz v.

United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the standard by which the applicability of the fourth amendment is determined is whether the evidence at issue was seized from a zone clothed by a reasonable expectation of privacy into which the government could not reasonably intrude to conduct a search or seizure. See, e.g., State v. Belcher, 317 So.2d 842 (Fla. 2d DCA 1975).

In the case before us appellant asserts an expectation of privacy as to the area adjacent to the rear of his residence, and the state has not persuaded us otherwise by its argument that an unenclosed yard is not a subject of fourth amendment protection. The state would argue that the fourth amendment does not protect activities conducted in an area which can be observed from outside the boundaries of his premises. In other words, that any

expectation of privacy as to activities in plain view is unreasonable, and therefore the fourth amendment is inapplicable to a seizure of evidence located in an unenclosed space. We agree with the analysis of this point made in State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728, 733 N.J. Super. App. Div. 1977):

> This contention, if adopted, would necessarily overrule the principle summarized in Coolidge that "plain view alone is never enough to justify the warrantless seizure of evidence"; for if "reasonable expectation of privacy" dissipates upon "plain view," then every warrantless intrusion following a "plain view" observation is lawful.[2]

---

2. Other jurisdictions have implicitly if not explicitly agreed with this analysis where they have held that an expectation of privacy may be unreasonable as to an otherwise lawful visual search, yet reasonable as to a seizure.

> When an officer inadvertently observes evidence of a crime from a vantage point that does

Typically, the yard adjacent to a residential dwelling, particularly the part of the back yard blocked from view from the front yard or street by the dwelling, is clothed with a reasonable expectation of privacy from unreasonable

---

> not intrude upon a protected area or when that protected area is entered with prior justification, there is no violation of the search warrant rule because there has been no "search.". . . This does not, however, mean that the officer may, without more, seize the evidence. If the evidence is itself within a protected area, the officer may not enter that area to effect the seizure without first obtaining a warrant, absent exigent circumstances or another exception to the warrant requirement.

State v. Parker, 355 So.2d 900, 904 (La. 1978) (observation of contraband in a lawfully parked van from outside the van not an intrusion and thereby not an unconstitutional search but absent exigent circumstances seizure of the contraband was unconstitutional.) See also United States v. Coplen, 541 F.2d 211 (9th Cir. 1976) (observation from outside an airplane, which did not constitute a search, would have established probable cause to secure a warrant and warrantless seizure upheld

governmental intrusion.[3/] See, e.g., Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974); accord, Olivera v. State, 315 So.2d 487 (Fla. 2d DCA 1975). While we

---

based on exigent circumstances provided by the mobility of the airplane); Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974) (observation made without physical encroachment on constitutionally protected area cannot justify search of defendant's premises and seizure of evidence subsequently found); State v. Lewis, ___ Mont. ___, 565 P.2d 642 (1977) (warrantless seizure of evidence in plain view is invalid absent exigent circumstances, although police observed evidence from place where he had a legal right to be and the discovery was inadvertent); State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728, (N.J. Super. App. Div. 1977) (contraband seen and identified from point off defendant's property is not a fourth amendment search but seizure based on observation is unconstitutional even though observation established probable cause for a warrant).

3. People v. Bradley, 81 Cal.Rptr. 457, 460 P.2d 129 (1969) appears on first glance to be on all fours with the case before us. However, the evidence seized in Bradley was located in the front of defendant's residence which was open to the view and accessible to any passerby.

believe this to be the general rule, because the test is necessarily subjective it would not necessarily always be true. For example, a back yard which is used for commercial purposes and subjected to a constant stream of visitors of customers, even if surrounded by a high, opaque enclosurer, would not satisfy the standard of privacy. The state has not shown us any facts peculiar to this case which would disspell appellant's expectation of privacy.[4/]

The next question confronting us is whether the facts of this case fit in one of the well-defined exceptions of the warrant requirement of the fourth amendment. The state argues that the contraband was in plain view, hence a warrant was un-

---

4. In its brief the state relies on facts which may be true but are not included in the record which if we could accept them may have affected our decision.

necessary. The burden of proof is on the state to demonstrate that all the elements of the plain-view exception are present, including exigent circumstances.

> The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge v. New Hampshire, 403 U.S. 433, 468, 91 S.Ct. 22, ____, 29 L.Ed.2d 564, 584 (1971); see also Hornblower v. State,

351 So.2d 716 (Fla. 1977).[5] We can discern no exigent circumstances to justify a warrantless seizure of a marijuana plant growing in the back yard of a residence where there is no indication that the contraband is subject to immediate destruction or removal.[6] See O'Herron, supra.

---

5. All too often, lawyers and courts alike attribute greater importance to the "plain view" doctrine than it deserves: it is easy to call it an "exception," but it is not an exception to the requirement that a search or seizure must be supported by a warrant issued by a magistrate upon a finding of probable cause. Plain view serves to provide a means of securing probable cause, and, absent the applicability of one of the true exceptions to the warrant requirement, nothing more. State v. Parker, supra, at 903.

6. At the hearing on the motion to suppress, the state did not even argue that exigent circumstances were existent.

Accordingly, we reverse the final judgment and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

OTT and RYDER, JJ., Concur.

IN THE SUPREME COURT OF FLORIDA
THURSDAY, MARCH 19, 1981

STATE OF FLORIDA,	**	
Petitioner,	**	CASE NO. 54,632
vs.	**	District Court
JOHN HENRY MORSMAN,	**	of Appeal, 2d District - No.
Respondent.	**	76-1543

On consideration of the Petition for Rehearing filed by attorney for petitioner, and response thereto

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur
OVERTON and ALDERMAN, JJ., Dissent

A true Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Debbie Causseaux
Deputy Clerk

cc: Hon. William A. Haddad, Clerk
Hon. R. H. Hackney, Jr., Clerk
Hon. Stephen L. Dakan, Judge
Charles Corces, Jr., Esquire
David A. Davis, Esquire

RECEIVED
MAY 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. 80-1764

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

Counsel for Respondent

10

TOPICAL INDEX TO BRIEF

	PAGE NO.
REASONS WHY THE WRIT SHOULD BE DENIED	
1. The Decision Of The Florida Supreme Court Does Not Raise An Important Federal Question Involving Privacy Expectations.	1
2. The Decision Of The Supreme Court Of Florida Does Not Conflict With Decisions Of The Supreme Court Of The United States And Federal Courts Of Appeal On Whether Open Fields Are Inevitably Associated With Privacy Expectations.	2
3. Whatever Decision This Court Makes If It Accepts Jurisdiction In This Case Will Have No Practical Effect On Respondent.	4
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Arkansas v. Sanders 442 U.S. 753 (1979)	1,2
Carroll v. United States 267 U.S. 280 (1925)	1
Hodges v. United States 243 F.2d 281 (C.A.5, 1957)	3
Katz v. United States 389 U.S. 347 (1967)	2
Lightfoot v. State 356 So.2d 331 (Fla.4th DCA 1978)	2
United States v. Baile 569 F.2d 1053 (9th Cir. 1978)	3
United States v. Johnson 561 F.2d 832 (D.C.Cir. 1977)	4
United States v. LaBerge 267 F.Supp. 686 (D.MD. 1967)	3
United States v. Van Dyke No. 79-5101 (C.A.4, opinion filed Feb. 26, 1981)	4
United States v. Williams 581 F.2d 451 (C.A.5, 1978)	3

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent, John Henry Morsman, respectfully asks this Court to deny the Petition for Certiorari, seeking review of the Florida Supreme Court's opinion in that case. That opinion is reported at 394 So.2d 408.

Reasons Why The Writ Should Be Denied

1. The Decision Of The Florida Supreme Court Does Not Raise An Important Federal Question Involving Privacy Expectations.

Respondent initially questions whether the Petitioner's issue, whether a backyard is "one of those areas inevitably associated with privacy expectations," is a substantial question requiring this Court's attention. The guiding principles concerning reasonable expectations of privacy have been articulated by this Court in such cases as Arkansas v. Sanders, 442 U.S. 753 (1979); Carroll v. United

States, 267 U.S. 280 (1925) and others. This Court, therefore, need not decide every factual variation on the themes presented in cases such as this one. See, Arkansas v. Sanders, supra (Blackmon, dissenting).

Moreover, this case does not clearly raise the important federal question petitioner claims it raises. That is, contrary to petitioner's claim, the Florida Supreme Court did not say that a backyard is inevitably associated with a right to privacy. The Florida Supreme Court made this clear when it distinguished Lightfoot v. State, 356 So.2d 331 (Fla. 4th DCA 1978) from the case at Bar. It noted that the policeman in Lightfoot saw the marijuana in the defendant's backyard from a neighbor's yard and did not have to go into his yard to see it as they had to do in this case. Thus, the Florida Supreme Court has not said that a backyard is inevitably associated with a privacy expectation but, depending upon the facts of the particular case, a person may have a reasonable expectation of privacy in his backyard. Even the dissent in this case recognized this point when it quoted Katz v. United States, 389 U.S. 347,351 (1967)

> "What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protections."

The issue petitioner raises, therefore, is either of insufficient importance for this Court to consider or was unaddressed by the Florida Supreme Court.

2. The Decision Of The Supreme Court Of Florida Does Not Conflict With Decisions Of The Supreme Court Of The United States And Federal Courts Of Appeal On Whether Open Fields Are Inevitably Associated With Privacy Expectations.

Despite petitioner's insistence, this case does not involve the nebulous "open fields" doctrine. The Florida Supreme Court, in the first place did not hold that "...a

backyard, ipso facto, is inevitably associated with privacy expectations,...." (Petitioner's Brief on Jurisdiction, pg. 7) Second, calling Respondent's backyard an "open-field" and thus without Fourth Amendment protections, Hodges v. United States, 243 F.2d 281,283 (C.A.5, 1957), is certainly a novel way to classify Respondent's backyard. A backyard is usually part of the curtilage or part of the "...area of domestic use immediately surrounding a dwelling...." United States v. LaBerge, 267 F.Supp. 686,692 (D.MD 1967). Respondent, moreover, is unaware of any case calling a backyard an "open field." The cases petitioner cites as conflicting with this case certainly do not say that. For example, in United States v. Baile, 569 F.2d 1053 (9th Cir. 1978) customs agents, patrolling the Mexican Border, followed some footprints onto the defendant's property. There they came upon a virtual junkyard of cars (one of which had marijuana in it) about 100 yards from the defendant's house. Id, at 1055. The court there said that because the truck with the marijuana was outside the dwelling and its curtilage, the defendant had no reasonable expectation of privacy in the open fields where the truck was found. Id, at 1056.

In United States v. Williams, 581 F.2d 451 (C.A.5, 1978) two agents of the Bureau of Alcohol, Tobacco, and Firearms crossed onto the defendant's property and eventually smelled the odor of moonshine liquor coming from a shed within a hogpen, fifty yards from two houses, one of which belonged to the defendant. The appellate court said the shed in the hogpen was part of the house's curtilage, Id, at 454, but justified the agent's trespass on the grounds that they "had merely approached the back wall of an extreme outbuilding across open fields." Id, at 454.

These two cases, therefore, are easily distinguishable from the case at Bar. Here there are no great expanses of 50

or 100 yards between some illegal activity and the dwelling and curtilage to justify calling a backyard an open field. And while the expectation of privacy is the focus of whether or not the Fourth Amendment applies, distances are a factor in determining the reasonableness of some expectation of privacy. United States v. Van Dyke, No. 79-5101 (C.A.4th, opinion filed February 26, 1981).

Thus, the open fields doctrine, like the frontier and unfenced prairie, is a relic from a more open, less crowded day. Such notions are best treated as historical oddities than contorted to face a more congested age.

Finally, Petitioner cites United States v. Johnson, 561 F.2d 832 (D.C.Cir. 1977). Petitioner, however, overstates the court's holding in that case by saying that the police trespass of two or three feet onto the defendant's property to look into a lighted window was a trespass "on the open field area surrounding the house...." (Petitioner's Brief on Jurisdiction pg. 11) The court made no such holding; it did not even mention the open fields doctrine. What it said was that the two or three foot intrusion only amounted to a deminimus violation of defendant's protected interests. Walking from the front door to the backyard, as the officer did is surely more than the technical trespass that occurred in Williams.

Petitioner, therefore, has been unable to show any conflict between this case and the cases he cites as conflicting with the decision of the Florida Supreme Court.

3. Whatever Decision This Court Makes If It Accepts Jurisdiction In This Case Will Have No Practical Effect On Respondent.

The trial court, after denying Respondent's motion to suppress, accepted his change of plea, and found him guilty of possessing marijuana. The court then sentenced him to one year probation and fined him $200. No stay of that order was entered. Thus, if this court accepts jurisdiction over his case, Respondent will only lose two hundred dollars, having

long since have served his probationary period. Thus, whatever decision this court may render in his case will have no practical effect on either the Petitioner or Respondent.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C McLain
WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

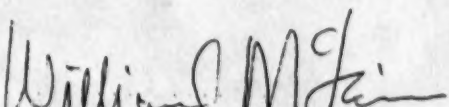
Counsel for Respondent.

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for JOHN HENRY MORSMAN, the Respondent, hereby certify that on May 14, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Respondent's Brief In Opposition To The Petition For Writ Of Certiorari To The Supreme Court Of Florida, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, JR., Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, May 14, 1981.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender

RECEIVED
MAY 18 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 80-1764

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Respondent, JOHN HENRY MORSMAN, through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Respondent has been represented by appointed counsel throughout his state court proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C. McLain
WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO.

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

AFFIDAVIT

I, JOHN HENRY MORSMAN, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The nature of said cause is briefly stated as follows:

I was convicted of possession of marijuana and was placed on one year's probation and fined two hundred dollars ($200). Florida's Second District Court of Appeal reversed the trial court's order denying my motion to suppress and the

Florida Supreme Court affirmed the Second District Court of Appeals ruling. I am now the Respondent in the State of Florida's Petition for a Writ of Certiorari to the Supreme Court of the United States.

JOHN HENRY MORSMAN

Duly witnessed and sworn to before me a Notary Public this 29 day of April, 1981.

Virginia A. Slaven
Notary Public

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires August 14, 1983

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for JOHN HENRY MORSMAN, the Respondent, hereby certify that on May 14, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis, with attached affidavit, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, JR., Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, May 14, 1981.

BY: William C. McLain
WILLIAM C. McLAIN
Assistant Public Defender